

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

76-1350

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:
UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
PHILIP RASTELLI, ANTHONY DE STEFANO
:
and CARL GARY PETROLE,
:
Defendant-Appellants.
:

:
On Appeal from the United States
:
District Court for the Eastern District
:
of New York
:
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P/s

PETITION FOR REHEARING WITH IN BANC
SUGGESTION ON BEHALF OF APPELLANT RASTELLI

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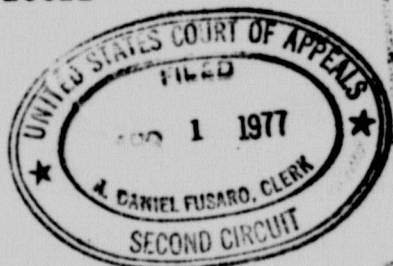


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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|---------------------------------------|---|-------------------------|
| UNITED STATES OF AMERICA, | : | |
| | : | PETITION FOR REHEARING |
| Appellee, | : | WITH IN BANC SUGGESTION |
| | : | ON BEHALF OF APPELLANT |
| -against- | : | <u>RASTELLI</u> |
| PHILIP RASTELLI, ANTHONY DE STEFANO : | | |
| and CARL GARY PETROLE, | : | |
| | : | |
| Defendants- | : | |
| Appellants. | : | |
| | : | |

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PRELIMINARY STATEMENT

This petition is submitted on behalf of the appellant, Philip Rastelli, for a rehearing of the appeal in this case. It is respectfully requested that an in banc rehearing be granted and the government submit a response to this petition. The matter was argued before this court on January 17, 1977 and by decision dated March 18, 1977, this court affirmed appellant's conviction.

We will not burden this court with a further recitation of the facts in this case or the applicable law as they are not in dispute and are amply expressed in the briefs previously submitted and in this Court's March 18 opinion.

The sole issue raised in this petition is the question of Judge Thomas C. Platt's refusal to grant a sufficient continuance to allow appellant's new counsel time to adequately prepare for trial.

ARGUMENT

This Court's opinion determined that Judge Platt's denial of a one month continuance was not an abuse of discretion. Further it was determined that as Rastelli's counsel had sought,

through Mandamus, a one week continuance, and, in effect, received the one week, no prejudice accrued to the appellant. Indeed, the Court determined that counsel for the appellant agreed that only a week's adjournment was necessary. Furthermore, there was allegedly no showing of prejudice. We submit that the court was in error in all of these findings.

The petition for mandamus only sought a one week continuance due to the fact that this was the amount of time to which the Governmnet would consent for a continuance. (39A).*

From the beginning of the involvement of Saxe, Bacon & Bolan, P.C. in this case up to the eve of trial, appellant's position had always been that 30 days was the minimum amount of time needed (36A;69A). Rastelli's counsel found himself on the horns of a dilemma. Once this Court denied the petition for mandamus, counsel had to go ahead as the trial court directed. There was never any indication that Rastelli's trial counsel felt one week was sufficient. Rastelli himself did not want Sutter to represent him because Sutter had done nothing in the way of trial preparation for the past 1 1/2 years. What choice did he really have under these circumstances? Certainly this would have done nothing more than to compound the already tragic situation. There was no other counsel available to represent the appellant as to this Court is aware. Either Saxe, Bacon accepted the one week or Rastelli would have effectively had no representation.

*References followed by "A" refer to Appellant's Appendix.

The question of prejudice is a difficult one. How can anyone speculate as to what the prejudice was at this stage of the proceedings? We will never know what an investigation or interview might have revealed, or what affect these might have had on the trial.

This Court has determined that Rastelli's counsel exhibited an experienced defense by attempting to isolate Rastelli from all incidents of crime. Whether or not this was a wise choice is not at issue. The simple fact is that under pressing time circumstances, this was the only available technique. A strong, vigorous and successful defense may very well have been employed if there had been adequate time to prepare. This again raises the theme which is central to this entire case - why should it be necessary to speculate as to what the effects of sufficient time would have been.

When considered as a group, the following features strongly urge a reversal:

1. Rastelli's prior counsel had done nothing in the way of pre-trial investigation;
2. No pre-trial motions were made;
3. Rastelli's prior counsel was unavailable to conduct the trial or to consult new counsel;
4. Rastelli was ill and incarcerated and could not assist in the preparation of the defense and, in fact, was forced to absent himself from several trial days;
5. Rastelli's new counsel, because of Judge Platt's obdurate refusal to grant an adjournment, was forced to expend nearly two weeks in seeking an adjournment rather than using this time for trial preparation;

6. Over twenty witnesses were called by the prosecution and the actual trial ran almost 2,000 pages of testimony;

7. Rastelli faced such a severe sentence as to make it patently unfair to force him to trial; and;

8. The charges were so complex as to mandate extensive preparation which could not be done under the circumstances.

Had there been adequate time to prepare, various methods could have been employed in the preparation of a defense. Members of the Association could have been interviewed to determine if the organization did in fact provide benefits to its members. This Court will recall that this was a crucial question during the course of the trial. Furthermore, this appellant's involvement or non-involvement with the organization could also have been similarly examined. Further investigation could have provided more ammunition for the defense as to the motives of prosecution witnesses in testifying. Since the entire case against Rastelli hinged on credibility, this area of investigation would have been vital. Other people in the industry may have provided sources to show that no "bumping" or extortion took place on any organized scale. The time limits imposed herein prevented any such steps from being taken. It is not enough to say that counsel could have done this during the time that court was not in session. Between reading the daily copy, preparing for the next days session and examining the pertinent law, such a possibility was out of the question.

Judicial economy became the watchword of Judge Platt's courtroom. In so doing, Rastelli's rights were severely prejudiced and scarcely protected. The fears expressed that he would receive the equivalent of a life sentence came

to pass when this 58 year old defendant was sentenced to a term of 10 years in prison. Such should not be the result of such a travesty of justice.

CONCLUSION

For the aforementioned reasons it is respectfully requested that this petition be granted.

DATED: New York, New York.
April 1, 1977.

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Respectfully submitted,
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